NO.

241

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
SEP 9 1957
JOHN T. FEY, Clerk

No. 241

IN THE

Supreme Court of the United States

OCTOBER TERM 1957

ALLEN COMMITTEE AND EDWARD D. SPILMAN,
Petitioners,
—*against*—
THE COLUMBIA GAS SYSTEM, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI

BRIEF OF THE COLUMBIA GAS SYSTEM, INC. IN OPPOSITION TO THE PETITION OF ALLEN COMMITTEE AND EDWARD D. SPILMAN FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

EDWARD S. PINNEY,
15 Broad Street,
New York, N. Y.
Counsel for Respondent,
The Columbia Gas System, Inc.

CRAVATH, SWAINE & MOORE,
RICHARD deY. MANNING,
JOHN F. HUNT, JR.,
Of Counsel

September 9, 1957

INDEX

	PAGE
TABLE OF AUTHORITIES	ii
DEFINITIONS AND REFERENCES	iii
COUNTERSTATEMENT OF QUESTION PRESENTED	1
COUNTERSTATEMENT OF THE CASE	1
ARGUMENT	4
I. There Is No Important Question of Federal Law To Be Decided by This Court	4
II. The Decision Below Presents No Conflict with Prior Decisions of This Court	5
III. The Only Reviewable Question Here Presented Is Whether the Court of Appeals Abused Its Discretion	6
IV. The Court of Appeals Correctly Exercised Its Discretion in Refusing to Reopen Its Prior Decisions	7
CONCLUSION	10

TABLE OF AUTHORITIES

STATUTES: PAGE

Bankruptcy Act, Chapter X (§§ 102-276), 52 Stat. 883 (1938), as amended, 11 U. S. C. §§ 501-676 (1952) iii

JUDICIAL DECISIONS:

In re American Fuel & Power Co., 122 F. 2d 223 (6th Cir. 1941) 1

Columbia Gas & Electric Corp. v. *United States*, 151 F. 2d 461 (6th Cir. 1945), *reh. and mod. denied*, 153 F. 2d 101, *cert. denied*, 329 U. S. 737 (1946) 1, 2, 7

In re Inland Gas Corp., 187 F. 2d 813 (6th Cir. 1951) 2, 4, 5, 7, 9

In re Inland Gas Corp., 211 F. 2d 381 (6th Cir.), *cert. denied*, 348 U. S. 840 (1954) 2, 3, 5, 7

In re Inland Gas Corp., 217 F. 2d 207 (6th Cir. 1954) 2, 7

Pepper v. *Litton*, 308 U. S. 295 (1939) 5

DEFINITIONS AND REFERENCES

The Petitioners attempted to make their points in the Court of Appeals below by two procedures—an appeal from the District Court's order and an original "Petition and Motion" to the Court of Appeals (which Petitioners sometimes refer to in their Petition here for a writ of certiorari as "the Petition").

In this Brief in opposition, we will use the following defined terms:

Petition: The instant petition of the Allen Committee and Edward D. Spilman for a writ of certiorari.

Petition Below: The "Petition and Motion of the Allen Committee and Edward D. Spilman for Leave to Propose Provisions in Plan of Reorganization" dated July 2, 1956, in the United States Court of Appeals for the Sixth Circuit.

Appeal Below: The appeal of the Allen Committee and Edward D. Spilman from the order of the District Court entered March 14, 1956 (No. 12865 in the Court of Appeals).

American Fuel, Inland and Kentucky Fuel: Respectively, American Fuel and Power Company, Inland Gas Corporation and Kentucky Fuel Gas Corporation, the debtors in the proceedings under Chapter X of the Bankruptcy Act in the District Court.

Emphasis has been supplied and parallel citations have been omitted in quotations throughout this Brief.

NOTE AS TO THE RECORD

Certain portions of the original record before the District Court were printed for the use of the Court of Appeals in Cases No. 9775-77 (prior appeals in these proceedings reported at 151 F. 2d 461 (1945)). In the appeals below these portions of the record were transmitted and certified by the District Court in the form of these printed volumes in lieu of original record and have also been transmitted and certified to this Court in this form. References thereto are designated: 1945 Rec.

COUNTERSTATEMENT OF QUESTION PRESENTED

Did the Court of Appeals abuse its discretion in refusing to reopen and reconsider determinations "previously, and repeatedly, made" in these reorganization proceedings?

COUNTERSTATEMENT OF THE CASE

Though hardly dispassionate, the Petition's "Statement" is (when supplemented as to the two matters discussed below) adequate to enable this Court to determine whether or not to grant a writ of certiorari. However, it contains numerous inaccuracies* and it is far from complete in its statements

first as to how often the Courts below have considered (and decided adversely to Petitioners) the issues which they now seek to raise, and

---

**E.g.,*

(a) The Petition (p. 9) quotes the last sentence of paragraph 13 of the Findings of Fact of the District Court entered in these proceedings on September 3, 1943, which sentence was in fact stricken from the Findings by the District Court (1945 Rec. V. I, p. 603).

(b) The Petition is replete with references to and quotations from the opinion of the Court of Appeals in 1941 (122 F. 2d 223) and relies upon it to establish certain facts. With respect to that 1941 decision to which Respondent was not a party and which was decided on the basis of allegations in pleadings, the Court of Appeals, in a subsequent decision, 151 F. 2d 461, 463 (1945), has stated:

> "... We are not obliged to consider whether, *upon the facts there assumed,* the American Fuel and Power case was rightly decided, or its mandate broader than the issues required. Columbia was not bound by it, the present record is complete, and the principle of 'the law of the case' does not govern our decision. ..."

That the Court of Appeals does not regard its opinion in 122 F. 2d 223 as presently pertinent to this case is further shown by the fact that the second paragraph of the opinion below (Judge Simons) cites all of the prior decisions of the Court of Appeals *beginning* with that in 151 F. 2d 461, and omits reference to the opinion in 122 F. 2d; see Petitioners' Appendix 26, 241 F. 2d at 375.

second as to the fact that the American Fuel stock (which the courts have so often held not entitled to the relief which Petitioners seek) was promoters stock issued to bankers and promoters who did not invest any of their own money in the companies involved.

As to the *first omission:* While the Petition, in summarizing (pp. 10-13) the "Petition Below", indicates that the Court of Appeals in 1945 (151 F. 2d 461) and again in 1951 (187 F. 2d 813) rendered decisions which would give nothing to the stock (*i.e.* determined that Respondent's claims should be subordinated but not rejected), and refers (p. 12) to one of the Court of Appeals 1954 decisions,* the Petition does not make clear that in 1954 the two issues which Petitioners now seek to raise were both considered and decided adversely to them, *once* by the District Court and *twice* by the Court of Appeals. After the Court of Appeals' first 1954 decision adverse to Petitioners' contentions,** Petitioners on remand filed with the District Court their "Joint Petition for Modification of Confirmed Plan of Reorganization" in which they raised essentially the same issues and requested substantially the same relief. After an adverse decision by the District Court (see Order entered October 7, 1954), Petitioners appealed and that appeal was dismissed on motion by the Court of Appeals as "without merit".***

---

*211 F. 2d 381 (1954).

**Technically, Petitioners were not parties to the 1945, the 1951 and the first 1954 appeals to the Court of Appeals. However, (i) the United States and the Securities and Exchange Commission, representing all American Fuel security holders (including Petitioners) participated in the 1945 appeal; (ii) Alvin Radford and Alfred Howell, *representing the American Fuel stock*, participated fully in the 1951 appeals, unsuccessfully urging the rejection of Respondent's claims; and (iii) in the first 1954 appeal, the American Fuel Trustee permitted counsel for Petitioners to utilize a portion of his time for oral argument before the Court of Appeals.

***217 F. 2d 207, 208 (1954).

No petition for writ of certiorari was made with respect to either of these two prior decisions adverse to Petitioners' present contentions.*

As to the *second omission:* with respect to the facts as to the issuance of the American Fuel stock (which the courts have so often held not entitled to the relief which Petitioners seek) the Petition says only (p. 5) that the common stock of Inland "was held by the organizers and underwriters". This is an inadequate statement of the fact that American Fuel stock was issued, without consideration, to the promoters and bankers who were responsible for the heavy overcapitalization, the insolvent condition and the uninterrupted net losses of the American Fuel companies.**

---

*Writs of certiorari were sought (unsuccessfully) by Respondent in 1945 (see 329 U. S. 737 (1946)) and by a creditor of Kentucky Fuel from the decision reported at 211 F. 2d 381 (see 348 U. S. 840 (1954))—but on issues other than those raised by Petitioner.

**The basic facts as to the issuance of the American Fuel stock (which was issued share for share in exchange for Inland and Kentucky Fuel stock and must therefore be traced to the original promotion of those companies; 1945 Rec. V. 1, p. 592) were found by the District Court in 1943.

As to the issue of the Inland stock, the findings were:

> ". . . The entire issue of its common stock consisting of 341,775 shares was acquired by the promoters and underwriters as compensation for services. The underwriters also received for their services from 10 to 12 percent of the proceeds derived from the securities [*i.e.*, the First Mortgage Bonds and Debentures which the underwriters and promoters sold to the public]. The net returns to the corporation were further depleted by other promotional expenses." (1945 Rec. V. 1, p. 591).

As to the Kentucky Fuel stock:

> ". . . The common stock of the company, apportioned among the promoters and underwriters, consisted of 500,000 shares." (1945 Rec. V. 1, p. 591)

ARGUMENT

I. There is No Important Question of Federal Law to be Decided by this Court.

The decision of the Court of Appeals raises no questions as to the power of a bankruptcy court to alter the rights of creditors or to reject claims because of inequitable conduct. In fact, in the opinion of Judge Miller it was specifically stated that:

> "Under the ruling in Sampsell v. Imperial Paper & Color Corp., 313 U. S. 215, and Pepper v. Litton, 308 U. S. 295, *the Court had authority to disallow the claim of Columbia.* Having declined to do so, Columbia is entitled to stand upon its rights as a creditor, even though a subordinated one. . . ." (Petitioners' Appendix 41, 241 F. 2d at 382)

Nor does the decision of the Court of Appeals raise any question concerning its power to reopen and reconsider its prior mandates in these proceedings. The Court of Appeals in prior appeals herein has consistently held that it has such powers; see, *e.g., In re Inland Gas Corp.*, 187 F. 2d 813, 815-16:

> ". . . Nor are we precluded by our previous mandate . . . from considering whether the plan of reorganization, now for the first time presented, is, in the light of all circumstances brought forth, fair and equitable, since the allowance of claims in bankruptcy remains interlocutory until the estate has been closed, New York N. H. & H. R. Co. v. Reconstruction Finance Corp., 2 Cir., 180 F. 2d 241, 243, and no application of the principle of 'the law of the case' need deter us from so doing, in an exceptional case, which this is, Reynolds Spring Co. v. L. A. Young Industries, 6 Cir., 101 F. 2d 257, 259 however such principle may circumscribe the action of a district court."

Indeed, throughout the many years of these proceedings, the Court of Appeals has several times revised its prior mandates with respect to the status of the claims of Respondent (and of others); see, *e.g.*, 187 F. 2d 813 (1951) and 211 F. 2d 381 (1954).*

II. The Decision Below Presents No Conflict with Prior Decisions of this Court.

Petitioners assert that "the judgment of the Court of Appeals . . . is in conflict with the rationale of *Pepper* v. *Litton*, 308 U. S. 295 . . ." (Petition p. 15).

But, as indicated above, the Court of Appeals *expressly* recognized its power to reject the claims of Respondent, relying upon that very decision. However, after considering rejection, that Court (in the instant appeals and in several prior appeals) held that the decree should be limited in remedy to the subordination of Respondent's claims. Thus, the Court of Appeals expressly followed the principle established in *Pepper* v. *Litton*, *viz.*, that a bankruptcy court, as a court of equity, *may* alter the priorities of creditors because of inequitable conduct and such alteration may take the form of *either* disallowance *or* subordination—as required by the facts of the particular case.** That case did not create an *inflexible rule requiring as a matter of law complete rejection* of claims presented by a creditor found to have engaged in inequitable conduct.

---

*Petitioners' Question 2 (Petition, pp. 3, 18-22) involves the somewhat complicated order of priority affirmed by the Court of Appeals in 211 F. 2d 381 (1954). Respondent refers to that opinion for an answer to Petitioners' contention that the order of priority there established raises an important question of Federal law or is in conflict with previous decisions of this Court.

**See, *e.g.*, 308 U. S. at 306, where, in discussing a tainted claim of an officer, director or stockholder, this Court stated:

> ". . . disallowance *or subordination* may be necessitated by certain cardinal principles of equity jurisprudence."

III. The Only Reviewable Question Here Presented is Whether the Court of Appeals Abused its Discretion.

The Petition concedes that:

> "If the court below had held that the changes in circumstances were insufficient to justify reconsideration of earlier decisions, *the only question which could be reviewed would be abuse of discretion.* But the refusal of the court below to consider whether the vast change in circumstances required reconsideration of its earlier decisions calls for the exercise of this court's power of supervision." (p. 22)

But the Court of Appeals did not refuse to consider the changes in circumstances which Petitioners alleged. It received their Petition Below, their Appeal, their briefs in support of both and heard their oral arguments. A reading of the opinion as a whole shows a full awareness of the fact that conditions had changed, that the value of the Inland estate had increased and that the possibility of Federal income tax had a major bearing upon any reorganization. The knowledge of changes appears throughout the opinion; that the opinion did not recite these changes in the particular paragraph dealing with these Petitioners is immaterial.

Even in describing that particular paragraph, it is not correct to say (as the Petition does, p. 4) that Judge Simons' only comment was that sustaining the Petition Below would mean a reopening, and this the court declined to do. The Petition's quotation from Judge Simons' opinion is inadequate. Judge Simons first said that these Petitioners have suggested that there are changed circumstances which warrant reopening; he next pointed out that others said that no changed circumstances were presented which called for a departure from previous determinations; he then declined to reopen determinations "previously, and repeatedly,

made." This is not a refusal to consider the changes. It is a refusal on the basis of the asserted changes to reopen.*

IV. The Court of Appeals Correctly Exercised Its Discretion in Refusing to Reopen Its Prior Decisions.

Despite the brevity of the opinion of the Court of Appeals, it is apparent from its past opinions and from the record in these proceedings that there were ample grounds to support its decision, *e.g.*, (a) the lack of standing of the American Fuel stockholders before a court of equity and (b) the tenuous nature of the so-called "changed circumstances".

LACK OF EQUITABLE STANDING

Petitioners themselves admit (Petition, pp. 4, 11-12, 22), that their Petition Below and Appeal requested that they be accorded another opportunity to litigate the issues which they had many times previously raised. Indeed, the issue of rejection raised by Petitioners' Question 1 had then been litigated four times, *viz.*, 151 F. 2d 461 (1945), 187 F. 2d 813 (1951), 211 F. 2d 381 (1954), and 217 F. 2d 207 (1954), and the issue of the order of

*The opinion of Judge Simons (speaking for the entire Court on this issue) states:

> "Of the remaining appeals and the petition of the Allen Committee, little discussion need be added in the present posture of this proceeding.... The Allen Committee has suggested that there are changed circumstances which warrant the reopening by this Court of its prior decisions.... The holders of Kentucky bonds and debentures asks [sic] us to dismiss the petition of the Allen Committee on the ground that it runs counter to our previous determinations, presents no changed circumstances calling for retreat therefrom, and moves its dismissal . . . on the ground that both are frivolous and without merit. Undoubtedly, the petitions, if sustained, would mean a reopening of determinations previously, and repeatedly, made. We *decline* to do so. . . ." (Petitioners' Appendix 37-38, 241 F. 2d at 380)

priorities raised by Petitioners' Question 2 (Petition, pp. 3, 18-22) had then been litigated twice (the two 1954 appeals cited, *supra*).* Petitions for writs of certiorari were not filed as to these latter two decisions;** of the four times the other issue had been decided by the Court of Appeals, there had been no petition for writ of certiorari since its 1945 decision (the denial of which is reported at 329 U. S. 737 (1946)).

In considering Petitioners' present extraordinary request, the Court of Appeals had before it the fact that the American Fuel stock was issued, without consideration, to the promoters and bankers who were responsible for the heavy overcapitalization, the insolvent condition and the uninterrupted net losses of the American Fuel companies and who placed the entire financial risk of the enterprise on the public creditors.

The standing of the American Fuel stockholders does not commend itself to a court of equity for an exercise of discretionary relief—especially since such relief requires the upsetting of twelve years of litigation.***

---

*In the past, the Securities and Exchange Commission has advised the District Court that the prior decisions of the Court of Appeals precluded consideration of the issues so often raised by Petitioners in the District Court, the Court of Appeals and now sought to be raised in this Court; see Supplemental Report to the Second Advisory Report of the Securities and Exchange Commission (April 7, 1955):

> "... The Court of Appeals considered and refused to follow the rejection theory and instead rested their decision on the subordination approach (187 F. 2d 813)... Therefore, neither of these objections are well taken and since they are *res adjudicata* should be denied." (p. 9; original emphasis)

See also Fourth Supplementary Report to the Second Advisory Report (December 3, 1955) (p. 7) which is to the same effect.

**See footnote *, p. 3, *supra*.

***We have quoted above the findings of the District Court, approved by the Court of Appeals, relating to the issuance of these stocks. There is extensive material in the record dealing with this subject: 1945 Rec. V. 2, pp. 158-59, 166-67, 304, 321-22; *id.*, V. 3, pp. 1073, 1077.

The So-Called "Changed Circumstances"

The Petition (pp. 13-14) relies on allegations of "[s]ubstantial changes in economic conditions" as "changed circumstances" requiring the Court of Appeals to reopen its prior decisions. Essentially, the so-called "changes in economic conditions" relied on by Petitioners are all founded upon an alleged increase in value of the assets of Inland.* The very same allegations (based on substantially the same factors, *e. g.*, the acquisition of additional gas acreage, the improvement in cash position, *etc.*) were presented to the District Court and the Court of Appeals in the second 1954 appeal (referred to *supra*) and, as indicated, the Court of Appeals dismissed the appeal as "without merit."

Subsequent to the dismissal of that appeal, Petitioners were permitted to introduce evidence on their allegation that the value of the Inland properties was $11,200,000** (Petition, p. 13, par. (1)). Other parties introduced evidence supporting a lesser valuation (*i.e.*, $8,000,000)*** which the District Court found (Order, entered December 15, 1955) to be the proper valuation as an upset price for a public auction sale of the debtors' properties.

---

*Petitioners imply that the Court of Appeals has refused to consider their allegations of an increased value of the debtors' estates and has refused to consider the possible impact of such an enhancement of value. Clearly, this is not so. The Court of Appeals has, in the past, instructed the District Judge to give heed to such changes:

> "It is clear that . . . the highly successful operations of the Inland trustee . . . will require substantial changes in the provisions of the plan, including a revaluation of Inland assets. . . . The court is to be free to make such changes as are required by this adjudication and to consider any accretion in value of Inland assets by reason of contracts made, or to be made, with consumers of gas . . ." (187 F. 2d at 820).

**See testimony of Petitioners' expert, V. C. Smith, Transcript 10/7/55, pp. 2-23; deposition of V. C. Smith, 10/20/55, pp. 2-106.

***See testimony of R. E. Davis and J. M. Wege, Transcript, 11/19/55, pp. 10-89.

Petitioners made no objection to (or mention of) this finding of the District Court in their Appeal, their Petition Below, or their briefs to the Court of Appeals, nor do they make such objection (or mention) in their Petition to this Court.

Thus, Petitioners' Petition Below and Appeal can hardly be said to have presented the Court of Appeals with "changed circumstances" requiring reconsideration.

CONCLUSION

For the foregoing reasons, the Petition of the Allen Committee and Edward D. Spilman for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,

EDWARD S. PINNEY,
15 Broad Street,
New York, N. Y.
Counsel for Respondent,
The Columbia Gas System, Inc.

CRAVATH, SWAINE & MOORE,
RICHARD deY. MANNING,
JOHN F. HUNT, JR.,
Of Counsel

September 9, 1957